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ARKANSASAG.GOV

The **Freedom** of Information Act

Simple As.

Legislative Intent

Ark. Code Ann. § 25-19-102 (Supp. 2019)

- to ensure that electors are **fully advised** of the activities and decisions of their public officials
- liberally construed in favor of **openness**
- exceptions are narrowly construed



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FOIA Overview – 3 Step Approach

Step 1: Is entity covered?

Step 2: Is the record/meeting covered?

Step 3: Are there any exemptions?



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Step 1: Is the entity covered?

- All government entities
- Some private entities
 - Public funding + intertwining (Ark. Op. Att’y Gen. 2010-081)
 - Not simply because doing business with the State. (*AIS v. Datascout*, 2018 Ark. 146, 544 S.W.3d 39 (2018); *Nabholz Constr. Co. v. Contractors for Pub. Prot. Ass’n*, 371 Ark. 411, 266 S.W.3d 689 (2007))



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Step 2: Is the record covered?



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For a record to be subject to the FOIA, the record must be:

- (1) Possessed by an entity covered by the FOIA
- (2) Fall within the FOIA's definition of a "public record" and
- (3) Not be exempted by the FOIA or other statutes

Nabholz Constr. v. Contractors Ass'n, 371 Ark. 411, 266 S.W.3d 89 (2007)



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Public Record Definition



What is a “public record”?

- (1) Writings, sounds, electronic info, or videos that
- (2) are kept
- (3) that constitute a record of the performance or lack of performance of official functions



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Public Records—How do you know?

- The content (*Pulaski Co. v. Ark. Dem. Gaz.*, 370 Ark. 435, 260 S.W.3d 718 (2007))
- The presumption:
 - (1) maintained in public offices or by public employees
 - (2) within the scope of their employment
- Rebutting the presumption
 - Record doesn't reflect the “performance or lack of performance of official functions.”



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Public Records cont. - Example

Emails and text messages

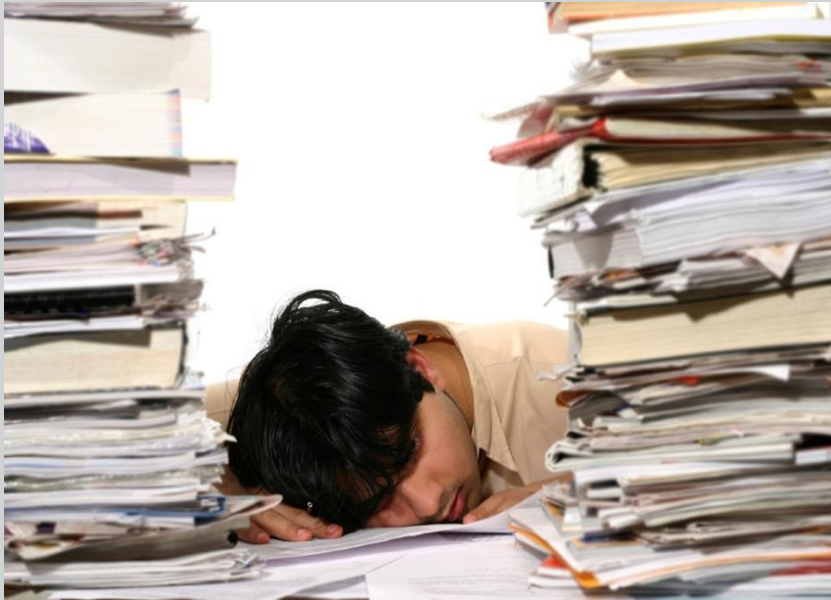
- “substantial nexus” test (*Pulaski Co. v. Ark. Dem-Gaz.*, 370 Ark. 435, 260 S.W.3d 718 (2007))



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General rule

All “public records” **must be disclosed** unless an exemption prevents their disclosure



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Step 3: Records Exemptions



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Sources of exemptions:

- FOIA
- Other statutes (state and federal)
- Constitutional



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Step 3: *Some* records exceptions

Personnel records

- Definition: As defined in AG Opinions, virtually all records pertaining to the individual employee that aren't evaluation records
- Stance: “It must be disclosed, unless....”
- Test: unless doing so constitutes a “clearly unwarranted invasion of personal privacy” (§ 25-19-105(b)(12))
 - Requires balancing of interests



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Personnel Records Balancing Test

- Public interest prong – degree to which disclosure would “shed light on the workings of government.”
Stilley v. McBride, 332 Ark. 306, 965 S.W.2d 125 (1998)
- Privacy interest – probably must be sufficiently intimate to give rise to a substantial privacy interest.
- Balance tips in favor of disclosure. Record disclosable if privacy interest is *de minimis*.



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Personnel Records - Commonly **Exempted** Items

- Social Security numbers
- Medical info
- Insurance, pension & benefit info
- Tax info & withholdings
- Personal contact info (home/cell numbers, home addresses, personal email addresses)
- Date of birth
- Marital status and info on dependents



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Personnel Records - Items Commonly **Open** to Inspection

- Name
- Salary info
- Contracts
- Employment applications
- Resumes
- Educational background
- Work History
- Leave Records
- Letters of recommendation



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Step 3: *Some* records exceptions

Evaluation records

- Definition: any record created by (or at the behest of) employer to evaluate an employee [*Thomas v. Hall*, 2012 Ark. 66, 399 S.W.3d 387]
- Stance: “It must be withheld, unless....”
- Test: unless ...
 - Suspended or fired (level of discipline)
 - Final administrative resolution (finality)
 - The records formed a basis for the decision (relevance); and
 - There’s a compelling public interest in the disclosure (compelling public interest).



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Compelling Public Interest

- Factors to consider when determining that a compelling public interest is present:
 - The nature of the infraction that led to suspension or termination, with particular concern as to whether violations of the public trust or gross incompetence are involved;
 - The existence of a public controversy related to the agency and its employees;
 - The employee's position within the agency.



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Mixed Records

A record is “mixed” when it can be classified as:

- More than one person’s evaluation,
- More than one person’s personnel record, or
- At least one person’s evaluation and at least one person’s personnel record.



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Mixed Records, cont.

- First step: Classify the records.
- Second step: Apply the relevant test for disclosure and make any necessary redactions.

Note: Most complaints against public employees are either the **personnel records** or **employee-evaluation records** of the person being complained about.

A complaint **by** a public employee is also usually a **personnel record** of the complainant.



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Personnel/Evaluation Records Compliance – Special Procedures

- Notify employee and requester within **24** hours of the agency decision
- Overnight mail notice is required if other notice fails
- The requester, custodian, or subject may request an opinion from the **Attorney General**



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Remember

A public employee is entitled to *his or her own personnel records and employee-evaluation records.*

– Ark. Code Ann. § 25-19-105(c)(2)



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The FOIA Request –



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Who is requesting?

- ❑ “Citizen” requirement (Ark. Code Ann. § 25-19-105(a)(1)(A); *McBurney v. Young*, 569 U.S. 221, 133 S.Ct. 1709 (2013)).
 - Includes corporations doing business in the State. (*Ark. Hwy. & Transp. Dept. v. Hope Brick Works*, 294 Ark. 490, 744 S.W.2d 711 (1988)).
- ❑ Inmate exemption (§ 25-19-105(a)(1)(B))



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How to **make** a FOIA Request

- **Mode**

- Any method will do (in person, fax, email, phone).

- **Specificity**

- Detailed enough for the custodian to locate the records with “reasonable effort.”

- **Medium**

- Any medium in which the record exists or is “readily available.”

- **Format**

- Any format in which electronic information is “readily convertible.”



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Who's the custodian?

- Person with “administrative control” (A.C.A. § 25-19-103(a))
- If custodian doesn't have physical possession, burden is on agency to acquire the records (*Swaney v. Tilford*, 320 Ark. 652, 898 S.W.2d 462 (1995))



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Evaluating the Request

- Public record?
- Exemptions?
- Redactions? (wield the Sharpie)



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Evaluating the Request, cont.

☐ Is it detailed enough?

☐ Unclear/extremely broad request

- Specificity requirement. Must be “sufficiently specific to enable the custodian to locate the records with reasonable effort.”

☐ Voluminous request

- Release records at certain intervals (by agreement). Possible charge if not using “existing agency personnel” (A.C.A. § 25-19-105(d)(3)(A)(i)).

☐ Is it a personnel record or employee evaluation?

(Remember special procedures)



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Providing the Records

- When?
 - 3 days if in active use or storage (but remember special procedures for personnel and evaluation records)
 - Otherwise: immediately



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Providing Records, cont.

- Open for inspection if requested
- Charging for copies?
 - Only “actual costs of reproduction” (includes mailing)
 - Not employee time
 - \$25 or more – may charge in advance
- Special requests for electronic records (A.C.A. § 25-19-109)



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FOIA and Meetings

Go back to Slide No. 3. If the answer to Step 1 — “Is the entity covered by the FOIA?” — is “Yes,” move on to Step 2:

Is the meeting covered?



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What is a “public meeting”?—definition

A.C.A. § 25-19-106(a): “[A]ll meetings, formal or informal, special or regular, of the governing bodies of all municipalities, counties, ... [and] school districts and all boards, bureaus, commissions, or organizations of the State of Arkansas ... supported wholly or in part by public funds or expending public funds, shall be public meetings.”

- In other words: “All meetings of governing bodies are public meetings.”
- But what’s a “meeting”? At the end of the day, it depends on all of the facts of a given situation.

And what is a governing body?

- It’s a panel, board, etc., that can make decisions.



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How many members make a meeting?

- A quorum of the body's membership does NOT have to be involved for a "meeting" to be found for FOIA purposes. *El Dorado v. El Dorado Broad. Co.*, 260 Ark. 821, 544 S.W.2d 206 (1976).
- But is there a particular number of members that have to be involved for it to be deemed a meeting? In the final analysis, yes – more than one.



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Social Gatherings/Conferences?



- Not a “meeting” if discussion of government business at the social gathering is incidental and intermittent (Op. Att’y Gen. 95-020)
- Probably not a “meeting” if the governing body has no control over the conference, function, or proceeding (Op. Att’y Gen. 94-131)



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“Virtual” meetings and the FOIA

A virtual meeting is a meeting of a governing body that is held when the governing body is discussing public business but in a way where the members are not gathered together in one place (think online meetings, teleconferences, etc).

Remember, the FOIA was originally enacted in 1967, when face-to-face public meetings were the norm, and “virtual” public meetings likely weren’t contemplated. Prior to this year, these kinds of meetings would still have been considered beyond the norm.



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“Virtual” meetings and the FOIA

Under Act 56 of 2021, the General Assembly codified temporary legislation that allows a public entity to hold open public meetings via electronic means (telephone, video conference, or video broadcast) if the Governor declares a disaster emergency. (A.C.A. § 25-19-106(e))

The public may attend the meeting using electronic means, and notice must be given of the virtual meeting. The physical presence of the public is not required under this subsection. The virtual meetings must be recorded and kept for at least one year.



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Teleconferences

- Meetings by telephone conference calls are subject to the FOIA. *Rehab Hosp. Serv's Corp. v Delta Hills Health Sys. Agency, Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985). The public's right to hear or otherwise monitor the call must be safeguarded, e.g., by the use of speaker phones, etc. *See generally* Op. Att'y Gen. 2000-096.
- Polling calls (talking to members individually to see how they're going to vote on a matter), secret telephone conference calls, and the like are NOT allowed.



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Are emails meetings?

The FOIA's open-meetings provisions *do* apply to email exchanges amongst members, but it's always a question of fact whether particular email communications violate the FOIA. *See City of Fort Smith v. Wade*, 2019 Ark. 222, 578 S.W.3d 276. So whether emails constitute a meeting depends on the facts of each case. *See* Op. Att'y Gen. 2005-166. (As pointed out above, FOIA questions are usually very fact-dependent. Thus, they don't often lead to easy "yes/no" answers.)



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What if the meeting is covered?

- The public must be allowed to “attend,” not necessarily participate, at meetings. (But see A.C.A. § 14-14-109(b), which requires *county* boards to afford citizens “a reasonable opportunity to participate prior to the final decision.”)
- Public must be able to see (or otherwise be able *to know*) how each individual member voted.



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Meetings must now be recorded

- Act 1028 of 2019 requires that all meetings of public bodies be recorded in a manner that at least captures the sound of the meeting. (Ark. Code Ann. § 25-19-106(d))
- The recordings have to be kept for at least one year and in a format that will allow for its reproduction upon a citizen's request.
- The recording requirement does NOT apply to:
 - Executive sessions
 - Meetings of volunteer fire departments.



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Enforcement

- Action is void if there's no public vote.
- Noncompliance in other respects renders action voidable by a court.

However, the court typically will only invalidate the action when:

- Plaintiff has given the governing body a chance to hold a meeting that conforms to the law, but the body refuses;
- Remedy is sought to vindicate public as opposed to private interest;
- The FOIA violation was substantial; and
- The defendant *knowingly* violated the FOIA.



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Enforcement



Civil Suits



Class "C" Misdemeanor



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Penalties and Enforcement

- Negligent violation is a Class C misdemeanor (A.C.A. § 25-19-104)
- Civil judicial enforcement—can appeal to circuit court (A.C.A. § 25-19-107(a))
- Attorney's fees (A.C.A. § 25-19-107(d))
 - To be assessed against defendant if plaintiff “substantially prevailed” unless defendant’s position was “substantially justified.”
 - Expenses can be assessed against plaintiff if action found to be frivolous or dilatory.
 - Can file claim for fees and expenses with Ark. State Claims Commission if “substantially prevail” against the State.



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Guides to Interpretation

- Freedom of Information Handbook (19th ed.)
- *The Arkansas Freedom of Information Act* (Arkansas Law Press, 6th ed., 2017)
- AG's website [www.arkansasag.gov]



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